

SUPREME COURT OF NIGERIA

FRIDAY 31ST MAY, 2013. SC. 221/2012

**CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, S. GALADIMA,
N. S. NGWUTA, M. D. MUHAMMAD, S. S. ALAGOA, JJSC**

1. OLUSEGUN ADEBAYO ONI
 2. PEOPLES DEMOCRATIC PARTY APPELLANTS
 - AND
 1. DR. JOHN OLUKAYODE FAYEMI
 2. ACTION CONGRESS OF NIGERIA
 3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION
 4. THE RESIDENT ELECTORAL
OFFICER IDO OSI LGA RESPONDENTS
 5. THE RESIDENT ELECTORAL
OFFICER OSI LGA
 6. THE RESIDENT ELECTORAL
OFFICER IJERO LGA
 7. THE INSPECTOR-GENERAL
OF POLICE
 8. THE NIGERIA POLICE FORCE
-

ELECTION PETITIONS - Appeal - Gubernatorial election - Jurisdiction - Final court - By 1999 Constitution s. 246(3) - SC has no jurisdiction to review decision of CA in appeals in respect of such election (H1)

CONSTITUTIONAL LAW - Constitution - Amendment - Court is not competent to alter the Constitution - As such duty is in the exclusive domain of the legislature (H2)

FACTS

Petitioner/1st respondent had before the National Assembly, Governorship and Legislative House Election Tribunal challenged the result of the gubernatorial election held for Ekiti State in April 2007 that returned 1st defendant/1st appellant as the winner. The Tribunal dismissed the petition which led 1st respondent to lodge an

appeal at the Court of Appeal, Ilorin Division. In its judgment, the court allowed the appeal in part and ordered a supplementary election in 63 affected wards of the State. After the supplementary election, 1st appellant was still declared the winner. Again, 1st respondent challenged the result of the election. The Tribunal annulled the result of the supplementary election in some wards and dismissed the petition.

1st respondent appealed to the Court of Appeal, which allowed the appeal and declared 1st respondent as the elected Governor of the State. 1st appellant thereafter wrote a petition to the Chairman of the National Judicial Council against the President of the Court of Appeal (Jst. Ayo Salami, PCA (as he then was)) who presided over the court that allowed 1st respondent's appeal. While the petition was pending, 1st appellant brought an application before the Supreme Court asking inter alia, for an order setting aside the judgment of the Court of Appeal. 1st appellant had accused the panel of Justices of the Court of Appeal of having close affinity with 1st and 2nd respondents. 1st respondent filed preliminary objection to the hearing of the motion on the ground that the Court of Appeal has become functus officio in the matter.

HELD (Unanimously striking out the appeal per
NGWUTA JSC)

Appeal - Gubernatorial election - Jurisdiction

1. There is no law, or any law, similar to Decree No. 18 of 1994, by which this Court can review the decision of the Court of Appeal in Governorship election petition appeals. My Lords, the appellants' entire case, when stripped of its extravagant build-ups and reduced to its proper frame, is simply an invitation to rely on Section 36 (1) of the 1999 Constitution to strip the ruling of the Court of Appeal of the finality granted to it by Section 246 (3) of the same Constitution.

In other words, the appellants want us to rely on Section 36 (1) of the Constitution 1999, to invalidate or render inoperative, the finality clause in Section 246 (3) of the same Constitution. In diverse decisions on appeals relating to Sec-

tion 285 (7) of the Constitution of the Federation, 1999 (as amended) this Court has consistently declined to derogate from, close its eyes to, depart from, modify or set aside expressly or by implication, a provision of the Constitution under any guise or pretext.

The Court does not hunger after jurisdiction. It can expound, but should not under any circumstance, such as the one presented in this appeal, expand its jurisdiction. The Court has no jurisdiction to hear the appeal and consequently, I sustain the 1st - 2nd and 3rd - 6th Respondents' preliminary objection on want of jurisdiction. (pp. 2515 H/2516 H)

Constitution - Amendment

2. A provision of the Constitution may seem out of touch with reality at any particular point of time, but in such cases, even when proven, the Court is not competent to intervene. The Court is bound by the Doctrine of Separation of Powers under which the business of lawmaking is in the exclusive domain of the Legislature made up of the Upper and Lower Chambers of the National Assembly (See Section 4 of the 1999 Constitution as amended). (p. 2516 D)

NOTABLE POINT OF INTEREST

NGWUTA JSC

1. Constitution is the grund norm in the country

I wish to emphasise that the Constitution of the Federation 1999 as variously amended, is the ultimate yardstick for determining the validity vel non of any act or decision in relation to any law in the country. Any derogation from one section thereof in preference to another section is not only extraneous to the Constitution but a violation of the solemn oath undertaken by all Judges to defend and protect it. (p. 2516 F)

REPRESENTATION

Chief Joe-Kyari Gadzama, SAN, with Dr. Sir Amaechi Nwaiwu, SAN; N. O. O. Oke, SAN, C. S. Pwul, SAN, Sen. Ameh Ebute, B. Akinola, Esq, M. A. Abubakar, Esq, Obafemi Adewale, Esq, J. N. Egwuonwu,

- Esq, Dr. Anamelechi N. Aguwa,, Chief Ifeanyi Eke, J. C. Okafor, Esq., Eze A. Nwauwa, Esq, Gani Faniyi, Esq, Henry Michael-Ihunde, Esq, U. M. Yamah, Esq, Olusegun Ilori, Esq, Ajide Olayemi Esq, C. O. Oli Esq, Ezekiel Agunbiade Esq, A. S. Akingbade Esq, Godwin Diugwu Esq, U. M. Jawur Esq, S. C. Enwere Esq, Lilian O. Unanwa
 B (Miss), Olubunmi Olugbade, Babatunde Jemilehin Esq, P. C. Igwenazor Esq, Onehizena Enaboifo Esq, U. E. Asuquo Esq, Tina Eto (Mrs.), P. G. Pwul Esq, S. O. Manah (Miss), O. O. Taiwo (Miss), Sumret G. Pwul (Miss), Adeyemi Adewumi Esq, Stephen Ademuagun
 C Esq. A. M. Ajuonuma (Miss), O. C. Ikoro (Miss), Ayatunde Adeleke Esq, Anselem C. Obaraeze Esq., for the Appellants
 John Olusola Baiyeshea SAN with Femi Falana, SAN, Samuel Ipinlaiye, Prof. M. M. Akanbi, Richard Baiyeshea, R. O. Balogun, Adedeji Adeyemi
 D Ibrahim Bawa with Alhassan Umar, Adbulazziz Sani, Rahlma Aminu (Mrs), Linda J. Etuk (Miss), Femi Atteh and F. E. Dimas, for the Respondents

CASES REFERRED TO

- E Habib v. Principal Immigration Officer (1958) 3 FSC 75
 Mobil Oil (Nig) Plc v. IAL 36 Inc (2000) SCNJ 124
 FRN v. Ifegwu (2003) 15 NWLR (pt. 842) 113
 Madukolu v. Nkemdilim (1962) NSCC 374
 Ajomale v. Yaduat (1991) SCNJ 172
 F DNPP v. Gobir (2012) All FWLR (pt. 623) 1821
 Ogboru v. Uduaghan (2012) All FWLR (pt. 610) 1206
 Emordi v. Igbeke (2011) 9 NWLR (pt. 1251) 24
 Okonkwo v. Ngige (2007) All FWLR (pt. 393) 1
 G Tukur v. Government of Gongola State (1989) 9 SCNJ 1
 MBN Plc v. Nwobodo (2005) All FWLR (pt. 281) 1640
 Ogbe v. Asade (2010) All FWLR (pt. 5010) 612
 Teriba v. Adeyemo (2010) All FWLR (pt. 533) 1868
 Garba v. Omokhodion (2011) 6 SCNJ 334
 H Okonkwo v. Odili (2003) 1 LRECN 260

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, ss. 36, 236(1), 246(3), 285(7)

Failed Banks (Recovery of Debts) & Financial Malpractice in Bank Decree No. 18 of 1994

Court of Appeal Rules, O. 19 r. 4

LEAD JUDGMENT BY NGWUTA JSC

This is an appeal against the decision of the Court of Appeal, Ekiti, holden at Ado-Ekiti in which a full panel of the Court declined the invitation to set aside its judgment. B

I will set out as much of the facts as I consider material to this appeal. C

The Governorship election was held in all the States of Nigeria including Ekiti State on 14th April, 2007. The Peoples Democratic Party flagbearer in Ekiti State, Olusegun Adebayo Oni, was returned as the winner of the election by the 3rd and 4th Respondents. First Respondent, Dr. John Olukayode Fayemi challenged the result of the election at the National Assembly Governorship and Legislative House Election Tribunal constituted for Ekiti State and sitting at Ado-Ekiti on various grounds. D

In the judgment delivered on 28/8/2008, the Tribunal dismissed the petition; whereupon the 1st Respondent lodged an appeal before the Court of Appeal, Ilorin Division. On 12/2/2009, the lower Court delivered its judgment in which it allowed the appeal in part and ordered a supplementary election in 63 wards, leaving the result of six (6) wards intact to be added to the result of the supplementary election in the 63 wards affected. E F

INEC, the 3rd Respondent, duly complied with the order of the lower Court on 24th April 2009 and 5th May, 2009. Both the 1st Appellant and the 1st Respondent contested the election with the candidates of other eleven political parties. G

When the result of the supplementary election was added to the result of the six uncontested wards, the 1st Appellant was declared winner with 111,140 votes against the 1st Respondent's 107,017 votes. Again the 1st Respondent challenged the result of the election. In its majority decision rendered on 5/5/2010, the Tribunal annulled the result of the supplementary election in some Wards and dismissed the Petition. First Respondent appealed to the Court of Appeal, Ilorin Division, against the majority decision of the Tribunal. By its judgment, delivered on 15/10/2010, the Court of Appeal H

allowed the appeal, set aside the majority decision of the Tribunal and affirmed the minority decision which pronounced the 1st Respondent the duly elected Governor of Ekiti State.

On 13th January, 2011 the Appellant wrote a petition headed “COMPLAINT AGAINST HON. JUSTICE AYO SALAMI & ORS FOR MY PREMEDITATED AND INJUDICIOUS REMOVAL FROM OFFICE AS GOVERNOR OF EKITI STATE” to the Chairman of the National Judicial Council, Supreme Court Complex, Abuja. On 14th March 2011, while the petition was pending before the NJC, the appellants brought a motion on notice pursuant to the inherent jurisdiction of the Court for the following reliefs:

- “1. An order setting aside the judgment of the Court of Appeal, Ilorin delivered on the 15th October, 2010 nullifying the election of the 1st appellant as the Governor of Ekiti State.
2. An order directing a fresh panel of the Court of Appeal to hear and determine the appeal de novo.
3. An order directing the Hon. Speaker of the Ekiti State House of Assembly to take over the governance of Ekiti State pending the hearing and determining of the appeal...”

The reliefs in the application were predicated on the following grounds:

- “1. The judgment of the Election Appeal Tribunal was delivered without jurisdiction and in breach of the Applicant’s right to fair hearing.
2. The judgment of the Election Appeal Tribunal is a nullity having been predetermined and delivered through a panel which has close affinity with the 1st and 2nd Respondents.
3. The judgment is compromised and vitiated by reason of the said close affinity between the Justices who sat on the panel, especially the President of the Court of Appeal who presided over the Panel, and the 1st and 2nd Respondents, in particular Senator Bola Ahmed Tinubu, leader and the alter ego of the 2nd Respondent.
4. That the said close affinity created bias in favour of the 1st and 2nd Respondents and against the Applicant.
5. That the Honourable Justices of the Election Appeal Panel Tribunal were disqualified to sit on the panel or entertain the appeal and deliver judgment thereon by reason of issues raised in a Sworn Affidavit regarding the relationship between Senator Bola Ahmed

Tinubu, a leader of the 2nd Respondent and the President of the Court of Appeal, Honorable Justice Isa Ayo Salami, who presided and delivered the lead judgment of the Tribunal.

6. That the Applicants were denied their right to a fair hearing by reason of the aforementioned averments.

7. That the judgment is a nullity for the reasons stated above...” B

The motion was supported by a 48-paragraph affidavit to which diverse documents, including the judgment sought to be set aside, were exhibited.

The 1st Respondent filed a 36-paragraph counter-affidavit in which he denied all the material facts in the supporting affidavit. The 1st and 2nd Respondents filed a notice of preliminary objection to the motion on 23/3/2011 while the 3rd-6th Respondents filed their own notice of preliminary objection also on 23/3/2011. Among others, the ground for the preliminary objection is that the Court below, having delivered its judgment on 15th October, 2010 has become functus officio. C

When the motion was called up on 29th March, 2011 the record of the Court below showed:

“COURT: Learned Counsel for the Appellant was directed to refer to paragraph 43 of his affidavit where he stated that the matter is before the National Judicial Council (NJC) pursuant to a petition filed by them and asked whether this same matter is not premature, E

“LADI WILLIAMS, SAN: We concede that the outcome of the NJC decision might affect the subject matter. I agree to an adjournment. F

“CHIEF ADENIYI: I agree with the position taken by the Court, but I object to the adjournment sine die.

“COURT: Since the Court does not know when the National Judicial Council (NJC) will conclude deliberations, the only option is to adjourn the matter sine die pending when investigations are concluded by the National Judicial Council (NJC). Consequently, this matter is hereby adjourned sine die.” See pages 132A to 132B of the record. H

The matter came up again on 27th February, 2012 and the record showed:

“WILLIAMS, SAN: This matter was adjourned sine die to await National Judicial Council resolute (sic) on the matter. The NJC has

since concluded their deliberation and produced a report. It is our intention to file CTC of the said report as it is our duty to assist the Court.

B “There are also some documents which has (sic) to come to light that we intend to file in addition to the motion filed on the 24th March, 2011. The 1st and 2nd Respondents filed a counter-affidavit while the 1st and 2nd and 3rd-6th Respondents filed a Notice of preliminary objection. The interest of justice will better be served. We are given time to file papers and written addresses.

C “BAIYESHA, SAN: Our hope this morning is for the learned Senior Counsel is (sic) to withdraw this application this morning to save us the embarrassment this application generates. Justice Ayo Salami and the Justices that sat on the matter have been thoroughly exonerated by the NJC. And we all owe him a duty to accept this D fact. This application ought not to have been on the record of the Court at all. There is no need for it. It is chasing shadows. We therefore urge the court to strike out this application.

E “Even if this matter will be taken is for the preliminary objection of the 1st and 2nd and 3rd-6th Respondents. Even then, this is not a trial Court where affidavit and counter-affidavit will be filed. I therefore object to any adjournment on this matter.

F “ADIGUN for 3rd - 6th Respondents: I submit it is a cardinal and principle of law that there should be an end to litigation. That new facts always emerge out of human relationship. There can therefore be no end to emergence of new facts. We therefore oppose no application for adjournment and urge the Court to dismiss the application. As it is strange, it is warred and cacogenic.

G “WILLIAMS, SAN: I submit even if we have nothing to urge the Court, we should be heard. It is our fundamental right.

H “COURT: We have considered the facts and circumstances of this case, and we are of the firm view that there is no need to grant further adjournment in this application. The Court will take the judicial Notice of the NJC report and if there are really new documents, those new documents ought to have been filed before today. We are therefore not inclined to granting an adjournment on the matter. Parties are hereby directed to proceed to argue the application and the preliminary objection.

“COURT: We take the preliminary objections and then the

motion on notice.”See pages 134-134B of the record.

The Court below took submissions of learned Counsel for the parties on the preliminary objection and adjourned the ruling to 3.00 pm the same day.

In its ruling delivered on schedule, the Court below reviewed the submissions of learned Counsel for the parties and concluded as follows:

“It follows therefore that where there is an allegation of likelihood of bias in a matter that has been determined to finality, this Court cannot exercise its jurisdiction in favour of the applicant.

This case of likelihood of bias would have been relevant if it had been raised at the hearing of the appeal before judgment was delivered. Having not been raised at the appropriate stage, this application lacks merit and is, hereby dismissed. Parties to this application shall bear their individual costs.”See pages 141-142 of the record.

Against the said ruling, the appellants appealed to this Court on five grounds of appeal. Learned Counsel for the parties filed and exchanged briefs of argument. From his five grounds of appeal, learned Counsel for the Appellants framed the following three issues for the Court to determine:

“i. Whether issues of bias or likelihood of bias are not issues touching on the fundamental rights of the appellants to fair hearing.

ii. Whether the denial of the Appellant’s right to fair hearing arising from bias or likelihood of bias is not a ground for a Court, including the Court of Appeal to set aside its own judgment.

iii. Whether, on the Court of Appeal refusing to set aside its judgment on the ground stated above, the Supreme Court can properly intervene to set such judgment aside.”

Learned Counsel for the 1st and 2nd Respondents raised preliminary objection to the competence of the appeal on the following grounds:

“(1) This Honourable Court has no jurisdiction to entertain this appeal, being on appeal emanating from the decision of the Court below in Governorship election petition of Ekiti State arising from the Governorship election of 2007 to which Section 246 (3) of the 1999 Constitution is applicable.

(2) Grounds 2, 3, 4 and 5 of the purported grounds in the notice of appeal filed by the appellants are not based on the decision

of the lower Court contained in the ruling of the lower Court of 27th February, 2012 being appealed against.

(3) *No valid issues have been distilled from the appellants' purported grounds of appeal. And/or that the issues distilled and argued in the appellants' brief do not relate at all to the purported grounds of appeal.*

(4) *Grounds 2, 3, 4 and 5 are incompetent in that the purported grounds of appeal do not flow from the decision of the lower Court.*

(5) *No valid issue for determination has been formulated from ground 1 in the notice of appeal. Consequently, the said ground 1 is deemed abandoned.*

(6) *There is no valid appeal before this Honourable Court."*

In the alternative, learned Counsel for the 1st and 2nd Respondents formulated one issue from the appellants' five grounds of appeal in paragraph 7.01 of his brief:

"Whether the Court of Appeal was/is right in refusing/dismissing the appellants' application to set aside the judgment of the said Court in the Ekiti State Governorship election petition."

In his brief of argument, learned Counsel for the 3rd-6th Respondents gave notice of preliminary objection thus:

"The 3rd-6th Respondents filed a notice of preliminary objection urging this Honourable Court to strike out this Appeal on the ground that this Honourable Court by virtue of Section 246 (1) (b) (11) & (3) of the constitution of the Federal Republic of Nigeria, 1999 lacks jurisdiction to entertain this appeal as the cause of action arose in 2007 when the Court of Appeal was the final Court in respect of appeals on Governorship Election Petitions."

In the alternative, learned Counsel formulated the following issue for determination:

"Whether having regard to the provision of Section 246 (3) of the 1999 Constitution this Honourable Court has the jurisdiction to hear and determine this appeal."

At the hearing of the appeal on 4th March, 2013, learned Counsel for the parties identified their respective briefs adopted and relied on same and each urged the Court to decide in favour of his clients. Learned counsel for the 1st-2nd Appellants and 3rd-6th Respondents argued their preliminary objections in their briefs. Learned

Counsel for the appellants filed a reply to each set of preliminary objections.

A preliminary objection to the competence of an appeal is a pre emptive strike aimed at scuttling the appeal in limine. See *Habib v. Principal Immigration Officer* (1958) 3 FSC 75 or (1958) SCNLR 219; *Mobil Oil (Nig) Plc v. IAL 36 Inc* (2000) SCNJ 124; *Nwosu v. Imo State Environmental Authority* (1990) 2 NWLR (Pt. 135) 688. I will therefore consider the arguments for and against the preliminary objections. The appeal will be heard and determined on the merit if the preliminary objections are not sustained.

Learned senior counsel for the 1st and 2nd Respondents predicated his preliminary objection on six grounds. He argued the six grounds of objection seriatim:

In ground 1 on Section 246 (3) of the Constitution (supra), learned Senior Counsel submitted that the power of a court to adjudicate on any matter is determined by the law or statute that creates that Court. He stated that jurisdiction is so fundamental in the adjudicatory process of the Court that any matter decided upon by a Court outside the purview of the enabling Statute is null and void and of no effect whatsoever. He cited *Madukolu v. Nkemdilim* (1962) NSCC 374 at 379 for the three conditions which must be present for the Court to adjudicate on a matter before it:

“1. The matter is properly constituted as regards numbers and qualification of the numbers if the number and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction; and

3. The case comes before the Court initiated by due Process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided. The defect is extrinsic to the adjudication.”

It was contended on behalf of the 1st and 2nd Respondents that where any of the aforementioned conditions is lacking, the Court would have no vires to adjudicate on the matter and anything done by way of adjudication in the circumstances would be a nullity. It was emphasised that the appellant, having lost in the Court of Appeal,

has no right of appeal to the Supreme Court.

Reference was made to the provisions of Section 246 (3) of the 1999 Constitution to the effect that:

“The decision of the Court of Appeal in respect of appeals arising from election petition shall be final.”

B Learned Senior Counsel referred to Ajomale v. Yadaut & Anor (1991) SCNJ 172 at 175; DNPP v. Gobir & 4 ors. (2012) All FWLR (pt. 623) 1821 at 1845 paragraph F in his contention that exercise of appellate jurisdiction is donated by Statute and that an appellate Court has no inherent jurisdiction to hear appeal nor can the jurisdiction be conferred on a Court by a Court order. He relied on Ogboru v. Uduaghan (2012) All FWLR (pt.610) 1206 at 1236 paragraph D and argued that the applicable law to a cause or matter is the law in existence at the time the cause of action arose and not at the time the D action was instituted or the judgment written.

He urged the Court to apply Section 264 (3) of the 1999 Constitution and not the 1999 Constitution (as altered) and to hold that the Court lacks power to entertain the appeal. He referred the Court to Emordi v. Igbeke (2011) 9 NWLR (pt. 1251) 24 at 35.

E Learned Senior Counsel submitted that the ruling of the Court of Appeal delivered on 22/2/2012 in which the lower Court dismissed the appellants’ appeal is conclusive and final and any attempt to re-litigate the matter would be a violation of Section 246 (3) of the 1999 Constitution and urged us to so hold. He relied on Okonkwo v. F Ngige (2007) All FWLR (Pt. 393) 1 at 13.

On reliance by appellants on the concept of fundamental rights, learned Senior Counsel submitted that the same is mere ploy to induce this Court to assume a jurisdiction it does not possess. He said G sentiment cannot provide a remedy where none exists. He relied on Alhaji Umar Abba Tukur v. Government of Gongola State (1989) 9 SCNJ 1 at 22 paragraphs 18-32.

H Ground 2 of the preliminary objection deals with grounds 2, 3, 4, 5 and 6 of the appellants’ grounds of appeal and issues formulated therefrom. The learned Silk argued that the said grounds which do not emanate from the decision of the Court below are not competent. He referred to the decision of the Court below at page 141 of the record, particularly to the portion in which the lower Court expressed the opinion that:

“In cases of established bias, this Court has consistently refused to review its earlier judgment. See the case of Ukachukwu v. Ubba (supra).” and submitted that the lower Court did not hold that the appellants had established a case of bias. He said that Ground 3 of the appeal is outside the purview of the decision appealed against. He referred to and relied on Onafowokan v. Wema Bank Plc (2011) B All FWLR (pt.585) 201 at 212 wherein this Court, per Mohammed, JSC, held that:

“The law is trite that a ground of appeal must be against a decision being appealed against and should constitute a challenge to the ratio of the decision.” C

He urged us to strike out Ground 3 as incompetent. This Court was urged to strike out issue 5 as a new issue raised outside the judgment of the lower Court without leave of the Court. Learned Senior Counsel relied on MBN Plc v. Nwobodo (2005) All FWLR (pt. 281) D 1640 at 1646, paragraph H.

He made the same submission in respect of Ground 4 of the grounds of appeal, adding that the issue of evaluation of evidence raised therein does not flow from the decision of the Court below, and that the Court below did not make a pronouncement on whether E or not bias was established.

On Ground 2, it was submitted that the Court below did not pronounce on Order 19 Rule 4 of the Court of Appeal Rules; though it was conceded that the issue was canvassed at the lower Court. F Learned Senior Counsel stressed that there was no appeal against the failure of the Court below to rule on Order 19 Rule 4 canvassed before it. He relied on MBN Plc v. Nwobodo (supra) in his contention that there is no nexus between Ground 2 and the decision of the Court of Appeal appealed against. He urged us to dismiss all the G grounds of appeal as incurably bad.

In Ground 3 of his grounds of preliminary objection, the learned Silk impugned the issues formulated in Appellants’ brief of argument. It was argued that even if the grounds of appeal were competent, though not conceded, the three issues formulated therefrom have H no nexus with the grounds of appeal.

He made particular reference to Issue 2 which states in part: *“... including this Court of Appeal...”* He argued that the issue is not only meaningless and unrelated to the grounds of appeal but was

erroneous by its reference to the Court of Appeal even though the matter is before the Supreme Court. He relied on *Ogbe v. Asade* (2010) All FWLR (Pt. 5010) 612 at 637 paragraph C in his contention that the issue not based on grounds of appeal ought to be struck out.

B He argued that since the issues formulated and argued are not related to the grounds of appeal, the said grounds are abandoned and liable to be struck out, and the appeal dismissed. He relied on *Teriba v. Adeyemo* (2010) All FWLR (pt.533) 1868 at 1887, paragraph G and *Garba v. Omokhodion* (2011) 6 SCNJ 334 at 362 paragraphs 15-25. He urged the Court to sustain the preliminary objection.

In his own brief of argument deemed filed on 4/3/2013, learned Counsel for the 3rd-6th Respondents gave a notice of preliminary D objection to the hearing of the appeal:

“... on the ground that this Honorable Court by virtue of Section 246 (1) (b) (ii) and (3) of the Constitution of the Federal Republic of Nigeria lacks jurisdiction to entertain this appeal as the cause of action arose in 2007 when the Court of Appeal was the final Court in E respect of appeals on Governorship Election Petitions.”

Arguing the preliminary objection in his brief, learned Counsel submitted a lone issue for determination:

“Whether having regard to the provision of Section 246 (3) of F the 1999 Constitution this Honourable Court has the jurisdiction to hear and determine this appeal.”

He reproduced the relevant provisions of Section 246 of the 1999 Constitution. Learned Counsel relied on *Hyde Onuaguluchi v. Ben Collins-Ndu* (2001) 7 NWLR (pt. 712) 309 wherein this Court G interpreted the provision of the National Assembly (Basic Constitutional and Transition Provisions) Decree No.5 of 1999 (which is impari material with Section 246 of the 1999 Constitution) and held that the Supreme Court has no jurisdiction to entertain appeal on National Assembly Election Petitions.

H He referred to, and relied on, *Emordi v. Igbeke* (supra); *Okonkwo v. Odili* (2003) 1 LREC/N page 260 at 267-267-281, 286-287 and 294-295. Learned Counsel said that this Court reaffirmed its decision in *Onuaguluchi v. Ndu* that Section 246 (3) of the 1999 Constitution is clear and that the finality of decision of the Court

includes both interlocutory and final decision of the Court of Appeal in Governorship Election Petitions up to the Supreme Court, on appeal.

Placing reliance on *Ogboru v. Uduaghan* (2012) All FWLR (pt.610) 1206, he contended that the word “final” in Section 246 (3) of the Constitution of the Federal Republic of Nigeria, 1999 connotes conclusiveness, a matter that cannot be revisited. He urged the Court to sustain the 3rd-6th Respondents’ preliminary objection. B

Learned Counsel for the appellants replied to the preliminary objection raised and argued by the 1st and 2nd Respondents in their joint brief of argument. He replied to the four grounds of preliminary objection seriatim. C

In Ground 1, he submitted that section 246 (3) relied on in the preliminary objection is not applicable as the case, according to learned Counsel, did not arise from election petition but anchored on jurisdiction, likelihood of bias and breach of the Appellants, right to fair hearing under Section 36 of the 1999 Constitution. D

He said that appellants did not appeal against the judgment of the Court of Appeal delivered on 15th October, 2012. On the contrary, the appellants brought an application dated 14th March, 2011 asking the Court of Appeal to set aside the said judgment on the grounds stated in the application. E

He contended that this appeal is against the ruling of the Court of Appeal on the ground of fair hearing under Section 36 of the 1999 Constitution. A plethora of cases was relied upon in urging the Court that a denial of fair hearing is a jurisdictional issue which nullifies the proceedings and a question of finality of the decision does not arise even where it is contained in the relevant provision. He urged us to so hold. F

In Ground 2 which is on objection to Grounds 2, 3, 4, 5 and 6 of the Grounds of Appeal, he contended that jurisdiction by whatever name and whatever shade can be raised anytime anywhere and can be raised in the Supreme Court for the first time and without leave. He argued that it can be raised *viva voce* or by the Court *suo motu*. He relied on *Omomeji v. Kolawole* (3008) 14 NWLR (pt. 1106) 180 at 196 paragraphs A-C. G

In Ground 3, learned Counsel argued that contrary to the argument of the 1st and 2nd Respondents, a careful perusal of the H

issues shows that the said issues were distilled from, relate to, arose from, and are consistent with the scope and confines of the grounds of appeal. He relied on *Adelusola v. Akinde* (2004) 12 NWLR (pt. 87) 295 at 311 paragraphs D-E in his contention that the Court frowns at a party raising frivolous argument.

B In issue 4 on the refusal to set aside the judgment, learned Counsel contended once more that a denial of fair hearing is a jurisdictional issue which nullifies proceedings no matter how well conducted as held by the Supreme Court in the case of *Dangyadi v. INEC* (No. 1) (2020) (pt. 1224) 1 at 90 paragraphs D-F. Based on a C plethora of authorities he cited, learned Counsel urged the Court to dismiss the preliminary objection raised by the 1st and 2nd Respondents.

Learned Senior Counsel for the 1st and 2nd Respondents filed D a reply to the appellants' reply to the preliminary objection. He argued that none of the authorities cited in support of the appellants' case is relevant in the peculiar special circumstance of the case. In particular, learned Senior Counsel picked on the case of *FRN v. Ifegwu* (2003) 15 NWLR (Pt. 842) 113 at 141 and 146 relied on by the E appellants where the Supreme Court held:

"Where the jurisdiction of a Tribunal is being challenged, the fact that the statute which set up the said Tribunal says that its decision shall be final does not foreclose the jurisdictional issue..."

F Learned Counsel argued that in *Ifegwu's* case, the provisions of the failed Bank (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 and Sections 1 and 33 of the 1979 Constitution were considered and the Court upheld the supremacy of the Constitution, unlike the case at hand where no provision outside the 1999 Constitution is in issue. He urged the Court to hold G that the case is not relevant to the case on appeal.

He made the same submission in respect of other cases such as *Dangyadi v. INEC* (supra) and others relied on by the appellants. He urged the Court to uphold the preliminary objection and dismiss the H appeal.

I have carefully considered the erudite submissions, as well as authorities cited and relied upon, by learned Counsel for the parties. From the materials provided by the parties, I have traced back the genesis of this appeal or this "purported appeal" as the Respondents

would like to refer to it, to the Gubernatorial Election held in all States of the Federation, including Ekiti State, on the 14th day of April, 2007. The ultimate aim of this appeal is to return the 1st appellant to the Government House, Ekiti, as the Elected Governor of the State.

Learned Counsel for the 1st and 2nd Appellant raised and argued his preliminary objection, on 6 (six) grounds. Learned Counsel for the 3rd to 6th Respondents relied on only one ground. In his ground one of the preliminary objection, learned Counsel for the 1st and 2nd Respondents argued that:

“This Honourable Court has no jurisdiction to entertain this appeal, being on appeal emanating from the decision of the Court below in Governorship election petition of Ekiti State arising from the Governorship election of 2007 to which Section 246 (3) of the 1999 Constitution is applicable.”

The 3rd-6th Respondents, sole ground is:

“Whether having regard to the provision of S.246 (3) of the 1999 Constitution this Honourable Court has the jurisdiction to hear and determine this appeal.”

The two grounds reproduced above are predicated on Section 246 (3) of the Constitution. There is no real difference between them but I will resolve the preliminary objection on the 3rd - 6th Respondents’ ground which is more precise and concise. I will consider the 1st and 2nd Respondents’ other grounds of preliminary objection if the above ground is not sustained. And if all the grounds fail, I will proceed to determine the appeal on its merit.

The respondents have urged us to strike out the appeal for want of jurisdiction, relying solely on the finality clause in Section 246 (3) of the Constitution (supra).

In their reply, Appellants relied on the provision of Section 36 of the Constitution (supra) and urged the Court to dismiss the preliminary objection and determine the appeal on its merit. Both parties appear to agree that the Constitution is the Constitution of the Federal Republic of Nigeria, 1999 and not the subsequent amended or altered version or versions.

The two Sections of the Constitution are hereunder reproduced:

“Section 36 (1): In the determination of his civil rights and obligations, including any question or determination by or against

any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

B “Section 246 (3): The decisions of the Court of Appeal from the National and State Houses of Assembly election petitions shall be final.”

C My noble Lords, the facts of this appeal appear to me curious, peculiar and novel. Two provisions of the 1999 Constitution - Section 36 (1) and Section 246 (3) appear to me to have been set on a collision course. I am not persuaded by the argument of learned Counsel for the appellants that:

D “...as the present appeal to this Honourable Court did not arise from election petition but anchored on misdirection, likelihood of bias and breach of the Appellants’ fair hearing provided for under Section 36 of the 1999 Constitution.”

E This is an attempt to wriggle out of the jurisprudential quagmire in which the appellants appear to have plunged themselves. As I said earlier in this judgment, the ultimate purpose of this appeal is to reinstall the 1st Appellant in the seat of power as the Governor of Ekiti State.

F This appeal is against the ruling of the lower Court in which the said Court declined to set aside its previous judgment in an appeal from the decision of the Governorship and Legislative House Election Tribunal in favour of the Respondents. The issues of “jurisdiction, likelihood of bias and breach of the appellants’ fair hearing” did not arise from the blues. The issues arose out of the refusal of the Court below to set aside its decision against the appellants in election G petition appeal.

H I have considered the plethora of cases decided by this Court and some persuasive authorities relied on by the appellants. In my humble view, the issue is not whether or not the lower Court violated Section 36 (1) of the Constitution in the proceedings leading to, and including its judgment in the Governorship election appeal in which it entered judgment against the appellants.

Rather, the issue is whether or not, in view of Section 246 (3) of the Constitution (supra) this Court is competent to entertain any matter arising from, or associated with, or founded, on that appeal.

The finality clause in Section 246 (3) of the Constitution, by its use of the word “shall” effectively denies this Court the authority to intervene.

I am inclined to the arguments of learned Counsel to the respondent to the effect that none of the cases relied on by the appellants dealt with facts similar to the facts of this appeal. For instance, appellants relied on the case of FRN v. Ifegwu (2003) 15 NWLR (pt. 842) 113 at 141 and 146 (and similar other cases) in which the Supreme Court held, inter alia:

“Where the jurisdiction of a tribunal is being challenged, the fact that the statute which set up the said Tribunal says that its decision shall be final does not foreclose the jurisdictional issue...”

It is on the basis of the decision reproduced above and other similar decisions that the appellants urged us to strip the ruling of the Court of Appeal in which that Court refused to vacate its earlier decision of the garb of finality with which Section 246 (3) of the Constitution clothed it.

In the case relied on by the appellants, the tribunal was established under the Failed Banks (Recovery of Debts) and Financial Malpractice in Bank Decree No. 18 of 1994. Under the Decree, the decision of the tribunal is final. In setting aside the finality granted to the decision of the Tribunal by Decree No. 18 of 1994 that created it, the Supreme Court interpreted the relevant provisions of the Decree in the light of the relevant provisions of the 1979 Constitution and upheld the supremacy of the latter.

Contrary to the Failed Bank Decree, the Court of Appeal, which falls within the expression “Court or other tribunal” in Section 36 (1) of the Constitution is a creature of the Supreme Law of the land. See Section 236 (1) of the Constitution of the Federation 1999 which provides:

“S.236 (1): There shall be a Court of Appeal.”

Section 246 (3) of the same Constitution clothed the judgment of the said Court in Governorship election petition appeal with the toga of finality. This Court set aside the judgment in FRN v. Ifegwu (supra) even though the law creating the tribunal made its decision final because the decision did not meet the requirements of the relevant provisions of the defunct 1979 Constitution.

There is no law, or any law, similar to Decree No. 18 of

1994, by which this Court can review the decision of the Court of Appeal in Governorship election petition appeals. My Lords, the appellants' entire case, when stripped of its extravagant build-ups and reduced to its proper frame, is simply an invitation to rely on Section 36 (1) of the 1999 Constitution to strip the ruling of the Court of Appeal of the finality granted to it by Section 246 (3) of the same Constitution.

In other words, the appellants want us to rely on Section 36 (1) of the Constitution 1999, to invalidate or render inoperative, the finality clause in Section 246 (3) of the same Constitution. In diverse decisions on appeals relating to Section 285 (7) of the Constitution of the Federation, 1999 (as amended) this Court has consistently declined to derogate from, close its eyes to, depart from, modify or set aside expressly or by implication, a provision of the Constitution under any guise or pretext. See *Ogboru & Anor v. Uduaghan* (2012) 2-3 SC 66 at 96; *Abubakar v. Nasamu* (2012) 2 SCNJ 310 at 337-338; *ANPP v. Goni* (2012) 2 SCNJ 255 at 284.

A provision of the Constitution may seem out of touch with reality at any particular point of time, but in such cases, even when proven, the Court is not competent to intervene. The Court is bound by the Doctrine of Separation of Powers under which the business of lawmaking is in the exclusive domain of the Legislature made up of the Upper and Lower Chambers of the National Assembly (See Section 4 of the 1999 Constitution as amended).

I wish to emphasise that the Constitution of the Federation 1999 as variously amended, is the ultimate yardstick for determining the validity vel non of any act or decision in relation to any law in the country. Any derogation from one section thereof in preference to another section is not only extraneous to the Constitution but a violation of the solemn oath undertaken by all Judges to defend and protect it.

The Court does not hunger after jurisdiction. It can expound, but should not under any circumstance, such as the one presented in this appeal, expand its jurisdiction. See *Akande & ors v. Alagbe & Anor* (2001) FWLR (Pt. 38) at 1352. **The Court has no jurisdiction to hear the appeal and consequently, I sus-**

tain the 1st - 2nd and 3rd - 6th Respondents' preliminary objection on want of jurisdiction.

The appeal is accordingly struck out. Parties to bear their respective costs.

B

I. T. MUHAMMAD JSC

The Preliminary Objections raised by the respondents against the competence of the appeal is well founded. It has been treated by my noble brother Ngwuta, JSC, to my satisfaction. I, too, strike out the appeal. I subscribe to the orders made in the lead judgment of my learned brother, Ngwuta, JSC.

C

MUNTAKA-COOMASSIE JSC

D

This is an appeal by the appellant Olusegun Adebayo Oni against the decision of the Court of Appeal, Ekiti Division Holden at Ado-Ekiti hereinafter called the lower court.

It is a well known fact that the Governorship election was held in all the states of Nigeria including the Ekiti State of Nigeria on 14th April, 2007. The Peoples Democratic Party (P.D.P) nominated Olusegun Adebayo Oni as their flagbearer. Mr. Oni was returned as the winner at the election by the Independent National Electoral Commission (INEC) and the Resident Electoral Officer Osi LGA.

F

The 1st respondent, Dr. John Olukayode Fayemi challenged the result of the election at the National Assembly Governorship and Legislative House Election Tribunal sitting at Ado-Ekiti on so many grounds.

The said Ekiti-Tribunal delivered its judgment on 28th August, 2008 dismissing the petition. The 1st respondent, Dr. John Olukayode Fayemi lodged an appeal before the Court of Appeal Ilorin Division. The Ilorin Division of the Court of Appeal allowed the appeal in part and ordered a supplementary election in 63 wards, leaving the result of six (6) intact to be added to the result of the supplementary election in the 63 wards affected.

H

Again the election result showed that the 1st Appellant was on the lead and he was declared winner with 11, 140 votes against the 1st respondent's 107,017 votes. Again the 1st respondent challenged

the result of the election at the Tribunal. The Tribunal in its majority decision annulled the result of the supplementary election in some wards and dismissed petition.

The 1st Respondent, Dr. Fayemi, successfully appealed to the Court of Appeal, Ilorin Division hereinafter called lower court.

B It is clear that the preliminary objection filed by the 1st, and 2nd and 3rd - 6th Respondents must and are hereby sustained and appeal is struck out. I had an opportunity of reading in a draft form the illuminating judgment of my learned brother Nwali Ngwuta JSC and I entirely agree with his lordship reasons and conclusions which I C adopt as mine. The appeal fortunately or unfortunately deserves to be struck out: same is hereby struck out by me. Parties shall bear their own respective lost.

D

ALAGOA JSC

This is an appeal against the Ruling of the Court of Appeal Ekiti Division delivered on the 27th February, 2012 which dismissed the application of the Appellants/Applicants for an order to set aside E its judgment delivered on the 10th October, 2010.

The brief facts leading up to the present appeal are that the 1st Applicant and the 1st Respondent were candidates at the 2007 Governorship election of Ekiti State.

F The 1st Appellant/Applicant was said to have won the election as Governor of Ekiti State. The 1st Respondents appeal to the Court of Appeal was upheld and the 1st Respondent was declared winner of the said Governorship election. The 1st Appellant/Applicant by motion on Notice prayed the Court of Appeal Ekiti Division to set G aside its judgment delivered on the 15th October, 2010 which nullified the election of the 1st Appellant/Applicant as the Governor of Ekiti State among other prayers. The Court of Appeal in its Ruling of the 27th February, 2012 dismissed the application of the Appellant/Applicant.

H The Appellant/Applicant being dissatisfied with this Ruling of the Court of Appeal has appealed to this court - the Supreme Court. The Notice of Appeal consists of five grounds. (See pages 147 - 149 of the Record of Appeal).

The Appellants distilled three issues from the five grounds of

appeal at page 4 of the Appellants Brief of Argument The 1st & 2nd as well as the 3rd - 6th Respondents have in their respective Briefs of Argument raised preliminary objections to the competence of the appeal. In addition to this the 3rd - 6th Respondents filed a separate Notice of Preliminary objection. Both preliminary objections make reference to section 246 (3) of the 1999 Constitution alluding that by that provision up to and as at 2007 when the Governorship elections took place, all such matters relating to Governorship elections ended at the Court of Appeal and could not be further adjudicated upon by the Supreme Court under any guise or form. Additionally the 1st and 2nd Respondents have contended that grounds 2, 3, 4 & 5 are incompetent in the sense that they are not based on the decision of the lower court contained in the ruling of the lower court and as such do not flow from the decision of the lower court and no valid issues have been formulated from those grounds.

The 1st and 2nd Respondents had stated by way of preliminary objection that “*this Honourable Court has no jurisdiction to entertain this appeal being an appeal emanating from the decision of the Court below in the Governorship election petition of Ekiti State arising from the Governorship election 2007 to which Section 246 (3) of the 1999 Constitution is applicable.*”

Similarly the 3rd - 6th Respondents had also asked “*whether having regard to the provision of section 246 (3) of the 1999 Constitution this Honourable Court has jurisdiction to hear this appeal?*” What is in issue in both objections is the interpretation to be given to Section 246 (3) of the 1999 Constitution. That section provides as follows: “*The decision of the Court of Appeal in respect of appeals arising from election petition shall be final.*” There is no doubt that this appeal is rooted in the gubernatorial election held in Ekiti State as in other parts of the country on the 14th April, 2007. The word used in Section 246 (3) of the 1999 Constitution is SHALL which connotes a command.

In HON. SUNDAY UGWA & ANOR V. HON. OJI LEKWAUWA & ANOR (SUIT NO. SC.143/2010 decided on the 3rd December, 2010) this Court in paragraphs G - A at pages 22 - 23 emphatically stated that under Section 246 (3) of the 1999 Constitution the decision of the Court of Appeal in respect of an appeal arising from an election petition is final - “*I have not the slightest doubt that the con-*

stitution has in clear and unambiguous language made the Court of Appeal a final Court in respect of Appeals arising from election petition as in the matter before us now” per Coomassie, JSC.

The Respondents are therefore right in their submissions that this court has no jurisdiction to entertain this appeal. The preliminary
B objections of the Respondents are therefore sustained.

It is for these reasons and the fuller reasons given in the lead judgment of my learned brother, Ngwuta JSC which I had the privilege to read in draft before now and which I completely agree with
C that I too strike out the appeal for want of jurisdiction while abiding on the order on costs.

D

E

F

G

H